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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

IN THE MATTER OF THE ESTATE OF DAISY WARE BEACH, Osage Allottee No. 719, Deceased.

GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian, and JOHNNIE MOHON, as legal guardian of GLADYS NAOMI WARE, an incompetent person, *Petitioners,*

VERSUS

BERNARD E. BEACH.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Gladys Naomi Ware by Johnnie Mohon, and Johnnie Mohon as legal guardian of Gladys Naomi Ware, an incompetent person, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma entered in this case on March 20, 1958.

OPINIONS BELOW

The order of the County Court, Osage County, Oklahoma containing the findings and conclusions of the Court of December 3, 1952, is unreported. It appears in the appendix, pp. 11a-19a.

The District Court, Osage County, Oklahoma, upon trial *de novo* entered its ordering containing findings and conclusions dated January 5, 1954, which is unreported but which appears at pp. 19a-22a of the appendix.

The opinion of the Supreme Court of Oklahoma is reported in 322 P. 2d 635 and appears at pp. 23a-35a of the appendix.

JURISDICTION

The opinion of the Supreme Court of Oklahoma was announced June 25, 1957. App. 23a. A timely petition for rehearing was filed, set for oral argument, argued in January, 1958, and denied February 18, 1958. App. 35a, 39a-40a. Pursuant to rules of the Supreme Court of Oklahoma, application for leave to file second petition for rehearing was denied March 11, 1958. App. 36a.

An order to issue the mandate was entered March 20, 1958, but enforcement of the mandate in the trial court was stayed. App. 36a. The mandate itself was issued March 20, 1958 (App. 36a), which marks the date the judgment became final under the practice in the Supreme Court of Oklahoma. See motion for clarification of judgment (App. 37a) and the order of the court below clarifying date of final judgment. App. 39a.

The issue of timeliness which might otherwise be raised on these facts under *Gypsy Oil Co. v. Escoe, etc.*, 275 U.S. 498, is thus disposed of by the authoritative ruling of the court below, App. 39a, as to its own practice respecting final judgment, which was stated by that court after the *Gypsy Oil* case had been specifically brought to its attention. App. 38a. The practice of applying for a second petition for rehearing is specifically provided for by Rule 29 of the rules of the court below and provision is made (Rule 33) for delaying issue of the mandate until that second application is disposed of. App. 3a.

The court below orders (App. 40a) that "the judgment in the above-styled cause became final on the 20th day of March, 1958, said date being the date of issuing of the mandate to the trial court in said cause." If that statement of the court below be respected, time within which to apply for a writ of certiorari would expire 90 days after March 20, so that the last day for timely filing of a petition for certiorari or application for extension of time would be June 18, 1958. However, referring to its denial of the application for leave to file a second petition for rehearing, the court below states in the same order—

> "That all steps authorized before the entry of a judgment had then [March 11, 1958] been exhausted, and this Court as provided by rule 33 of this Court [App. 3a] issued its judgment in said cause which is a part of its mandate dated March 20, 1958."

The statement that all steps authorized prior to entry of judgment had been exhausted March 11, 1958 (together with the reference to "entry" of the final judgment, the controlling fact under § 2101(c) of the Judi-

cial Code) led counsel to apprehend that perhaps the determinative date was March 11, 1958, when the application for leave to file a second petition for rehearing was denied. If that date controls, then the last day for timely filing would be June 9, 1958. Out of abundant caution, counsel filed with the Clerk of this Court on June 9, 1958, an application for extension of time, which was granted by Mr. Justice Whittaker on June 10, 1958, to and including June 23, 1958, "provided the statutory time has not already expired." App. 41a.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is § 1257(c) of the Judicial Code.

QUESTION PRESENTED

Whether (notwithstanding state law as to vesting of decedents' estates) Congress has power to provide, as to the estate of a deceased, restricted Osage Indian held in trust by the United States, that the restricted estate shall not go to a surviving spouse who fails to show Indian ancestry in a manner prescribed by Congress to forestall non-Indian "social prospectors" from acquiring Osage trust property through marriage.

STATUTES INVOLVED

Pertinent portions of the statutes involved are set forth in the separate appendix, App. 1a-2a.

STATEMENT

In 1925 Congress provided that for the future "none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe" any interest in "any restricted lands, moneys,

or mineral interests of the Osage Tribe." Act of February 27, 1925, App. p. 2a. Thereafter, in 1934, Daisy Ware Beach, a fullblood, restricted Osage Indian, married respondent. App. 11a. By her will of 1946 (approved by the Secretary of the Interior as required by Act of April 18, 1912, App. 1a-2a, to be effective), she disinherited her husband with a $1 bequest. She died May 18, 1949.

While the probate proceeding of the estate of Daisy Ware Beach was pending but before the question of fact of Indian blood of the husband was even asserted by respondent husband, Congress amended the 1925 Act referred to above to add the following proviso (Act of September 1, 1950, App. 2a): ". . . *Provided,* That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States, and is enrolled on a membership, census, or other roll prepared under direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled . . ."

When Congress adopted this provision respondent had not filed a formal pleading alleging Indian blood. In the hearings below he made no effort to establish that he was enrolled on a roll prepared under the direction of the Secretary of the Interior or had a lineal ancestor so enrolled as required by the Act of September 1, 1950. App. 27a.

The federal question was raised in answer to a petition for determination of the heirs which had been

filed by an administrator *c.t.a.* and respondent husband on July 16, 1951. App. 8a. The answer, filed March 24, 1952, in paragraph 3 specifically set up the Acts of Congress of February 27, 1925, and September 1, 1950, and in paragraph 4 showed that respondent had never filed a formal pleading alleging that he is of Indian blood, and denied his right to share as an heir unless he establishes his United States citizenship and that he is of Indian blood and enrolled on some roll prepared under the direction of the Secretary of the Interior or had an ancestor so enrolled. App. 10a.

The probate court (County Court of Osage County, Oklahoma) held in paragraph 11 of its findings (App. 14a, 15a) that decedent left as her next of kin and sole and only heirs of law her husband (respondent) and an adopted son, "but that the said Bernard Beach [respondent] is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of the restricted estate of his said deceased wife . . ." In paragraph 13 (App. 16a) the court found and held: "That the surviving husband, Bernard E. Beach, filed herein his election to take against said will and under the laws of the State of Oklahoma, but that the said Bernard E. Beach is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of said restricted estate; . . .": Similar language appears in the decree portion of the order. App. 18a. As a result, the court held that the estate vested in decedent's sister, the residuary legatee and devisee under the will.

On trial *de novo* in the District Court of Osage County, Oklahoma the court held the issues generally in favor of respondent surviving husband, finding that it had been proved that the grandfather of respondent was of Indian blood (App. 20a), holding that respond-

ent "is, under his election to take under the laws of descent and distribution of the State of Oklahoma, entitled to and did inherit one-half of the estate of the said decedent." (App. 21a).

The Supreme Court of Oklahoma gave extensive consideration to the federal question. It acknowledged that respondent had not complied with the act of September 1, 1950 (App. 27a), and held:

> "It is well established in this jurisdiction that property descends upon death and vests immediately in the heirs, legatees and devisees, subject only to control of the county court for purposes of administration. [Citing authorities.] Since one has a vested right in property to which he succeeds under the law of descent and distribution or under the will of a decedent immediately upon the death of the decedent, it follows that an estate must be distributed among heirs and distributees according to the law as it exists at the time of death of the decedent. [Citing authorities.]
>
> We are therefore of the opinion and hold that the right of Bernard Beach, as surviving spouse, to succeed to his statutory share of the estate of Daisy Ware Beach, deceased, vested immediately upon the death of Daisy Ware Beach in 1949, and is controlled by the substantive law pertaining thereto as it existed at that time, namely, the Act of Congress of February 27, 1925, above quoted, as it existed prior to the 1950 amendment, supra. The amendment of September 1, 1950, is not applicable to this case and the trial court did not err in so holding."

REASONS FOR GRANTING THE WRIT

When Congress provided in 1950 (Act September 1, 1950, App. 2a) that to prove "Indian blood" as required by the 1925 act a claimant to inheritance from

an Osage must do so by proving his enrollment as an Indian or enrollment of a lineal ancestor, the purpose of the amendment was stated by the House committee as follows (H. REPT. No. 2913, 81st Cong., 2d Sess.):

> "... This apparently was the real intention of the present law enacted in 1925, but a loophole was found whereby hearsay evidence could establish the degree of Indian blood and relationship.
>
> "There have been a number of instances of prolonged and extensive litigation over the right to inherit by claimants under the 1925 act, ...
>
> "Also, the wealth of the Osage Indians has attracted 'social prospectors' who would like to marry into the tribe for purely mercenary reasons. As a matter of fact, experience and practice has shown that, under the present law, advantage has been taken by unscrupulous people, and that apparent effort has been made on the part of certain white people to come into the tribe by intermarriage simply for the purpose of acquiring property.
>
> "It is the opinion of the Public Lands Committee that the present law has been subjected to grave abuse, and that there is definitely a need for making clear the method of making proof of heirship. ..."

As an indication of its broad sweep, Congress stated that the new act did not exclude pending judicial proceedings except "those in which the claimant has filed a formal pleading alleging Indian blood." This pending proceeding was not in the excepted class. Therefore this case was squarely within the class of Osage estates to which Congress was attempting to give the protection of the new act. The court below has ruled that attempt "inapplicable" because of a vesting of the estate at the time of death.

The notion that the property of restricted Indians in some manner "vests" under state law so that the United States is without power to grant protection to the Indian property is not advanced for the first time in this case. It was asserted as to the Osages themselves (decedent here having been a fullblood Osage) in *United States* v. *Osage County*, 251 U.S. 128, 132. There Osage lands had been allotted to the individuals in 1906 and certain of those lands made subject to state and local taxation. The attention of Congress having been called to overassessments on those lands in comparison with the lands of non-Indians, Congress by Act of March 2, 1917, authorized an appraisement by the Secretary of the Interior and the fixing of the extent of the overassessment. Of the argument that state law had become applicable so that the federal statute could not apply, Chief Justice White noted that "it proceeds upon the assumption that by the Act of 1906 the United States exhausted its power as the protector and guardian of the Osage Indians and as to them had no longer any mission or authority whatever. We pass from this contention without further notice, as it is so obviously opposed to the doctrine upon the subject settled from the beginning and so in conflict with the terms of the act of Congress that nothing more need be said concerning it." The Court referred to the position of "the United States as guardian of the Indians" and its "duty to protect them from spoliation." p. 133.

In *Gritts* v. *Fisher*, 224 U.S. 640, an act of Congress in 1902 had provided for a permanent enrollment of Cherokees, for an appraisal of tribal land, specifically provided that the enrollees should alone be entitled to share in the distribution and that no child born after the date of the act should be entitled to share. Not-

withstanding that, in 1906 Congress reopened the roll to permit the "too-late babies" (those born after the 1902 cut-off date and up to April, 1906, and for 90 days thereafter) to be enrolled and to share. While this Court did not doubt that the 1902 Act contemplated that the 1902 enrollees alone should receive the remaining properties of the tribe, it held that this did not constitute such a vested right as would disable Congress from making provision for the allotment and distribution to the newly born members. This Court cited a number of cases.

The properties here involved are trust properties; and their disposition, this Court has held, is governed by federal law: "Congress provided that the lands should descend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas, or any other State, might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission." *Childers* v. *Beaver,* 270 U.S. 555, 559.

While the issue in this case is one of the power of Congress to affect a pending proceeding relating to Indian trust property as it purported to, rather than *whether* it so intended, the case otherwise bears considerable resemblance to *Blanset* v. *Cardin* (C.C.A. 8th, 1919), 261 Fed. 309, which this Court affirmed, 256 U.S. 319. There, too, a husband sought to renounce the will of a restricted Oklahoma Indian and take a surviving spouse's distributive share; there, too, it was asserted that Oklahoma law vested the right in the surviving husband at the instant of death, so that approval of the Indian will by the Secretary of the Interior in accordance with federal statute did not deprive him

of the property which had been freed of restriction by the death. Each court which passed upon it found against this contention. The Court of Appeals noted (261 Fed. at p. 312)—

> "... Congress was well advised that unworthy and designing persons sometimes contract marriages with Indians with a view to obtaining the benefit of the property which the United States has granted to the Indians and that the right of a testator or testatrix to select devisees, and the right of the Interior Department to disallow any will, would often afford needed protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state laws. ..."

This Court agreed. 256 U.S. at p. 326.

The decision of the court below may be founded on disagreement with the policy of Congress in the 1950 legislation; for it says (App. 28a)—

> "There are many persons who are undeniably of Indian blood who are not enrolled on any roll prepared under the direction of the Secretary of the Interior and who have no lineal ancestor so enrolled. On the other hand, many intermarried whites and negro freedmen were made members of the various Indian tribes and were enrolled on the tribal rolls even though not a single drop of Indian blood flowed through their veins. Obviously, then, the possession of Indian blood and the appearance of the name on the rolls above referred to are not synonymous, and the proof of one would not constitute the proof of the other. ..."

If so founded, the decision below conflicts with the holding of this Court in *Campbell* v. *Wadsworth*, 248 U.S.

169, 178, likewise involving the review of the court below on an Indian probate matter. There the court below had indicated its dissatisfaction with an Act of Congress embodying the Seminole Agreement of 1899, and as a result had interpreted it to mean otherwise than it rather plainly said. This Court concluded—

> "All statutes of descent and distribution are arbitrary expressions of the purpose of the law-making power; and that the provisions of such a statute do not happen to meet the notions of justice of a court is not sufficient reason for indulging in an interpretation which modifies their plain and unambiguous terms. Especially is this true of these Indian statutes which are a progressive development, embodying concessions to tribal custom and tradition necessary to be made in order to accomplish a practical, though perhaps not an ideal, dissolution of the tribal relation and distribution of the tribal property."

CONCLUSION

The writ should be granted.

Respectfully submitted,

FRANK W. FILES
Pawhuska, Oklahoma

JOHN W. CRAGUN
744 Jackson Pl., N. W.
Washington 6, D. C.

Counsel for Petitioners

SUPREME COURT. U. S.
FILED
JUN 19 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 117

In the Matter of the ESTATE OF DAISY WARE BEACH, Osage Allottee No. 719, Deceased.

GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian, and JOHNNIE MOHON, as legal guardian of GLADYS NAOMI WARE, an incompetent person, *Petitioners*,

v.

BERNARD E. BEACH.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1957

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

APPENDIX

Statutes Involved

Act of April 18, 1912, 37 Stat. 86, 88:

Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust

funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided,* That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

Act of Feb. 27, 1925, 43 Stat. 1008, 1011 (25 U.S.C. § 331 note):

Sec. 7. Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: *Provided,* That this section shall not apply to spouses under existing marriages.

Act of Sept. 1, 1950, 64 Stat. 572 (25 U.S.C. § 331 note):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011), which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section after the comma following the word "*Provided*" and inserting in lieu thereof the following: "That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. *Provided further,* That this section shall not apply to spouses under marriages existing on February 27, 1925."

Rules of Supreme Court of Oklahoma

Rule 28

REHEARINGS

(1) Applications for a rehearing in any cause, unless otherwise ordered by the Court, shall be made by petition to the Court, signed by counsel, and filed with the Clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing without leave of Court. The Clerk shall not file any such motion or application except by leave of the Court first obtained. No petition for rehearing shall be filed or considered without proof of service.

Rule 29

APPLICATION FOR SECOND PETITION FOR REHEARING

(1) Within five days (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and a brief in support thereof.

Rule 33

MANDATE AND ISSUANCE

(1) After the expiration of fifteen (15) days from the filing of an opinion proper mandate to the trial court may issue; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied the mandate shall not be issued and transmitted until the

expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of.

(2) If such application for a second petition for rehearing is denied, the mandate may issue.

(3) All mandates shall be issued by the Clerk on order of the Chief Justice.

No. 5655

Petition for Probate of Will

STATE OF OKLAHOMA } IN COUNTY COURT
OSAGE COUNTY }

In the Matter of the Estate of Daisy Ware Beach, Osage Allottee No. 719, Deceased.

COMES Now Bernard Beach and shows to the Court; That Daisy Ware Beach departed this life at Pawhuska, Oklahoma on or about the 18th day of May, 1949, that said decedent at the time of his death was a resident of Osage County, State of Oklahoma; that said decedent left estate in the County of Osage, State of Oklahoma, the general character and probable value of which is hereinafter stated; that said decedent left a Will bearing the date of about the 20 day of August, 1946 which petitioner alleges to be the last Will and Testament of said deceased, and which is herewith presented for probate; that Jesse J. Worten the person named in said Will as executor is dead.

That Paul A. Comstock for whom letters of administration with the will annexed, are prayed herein is a resident of Osage County, State of Oklahoma, his post office address being Pawhuska, Oklahoma.

That the names, ages and residence of the heirs and devisees of decedent so far as known to petition are as follows:

Name	Age	Residence P.O.
Bernard Beach, husband,	adult	Pawhuska, Oklahoma
Ted Hazelbaker, adopted son,	adult	Fairfax, Oklahoma
Gladys Ware, sister,	adult	Okla. Hospital, Vinita, Oklahoma
Charles Frank Ware, Jr., nephew,	minor	Ponca City Military Academy, Ponca City, Okla.
Juanita Ware West,	adult	1303 North Vandalia, Tulsa, Oklahoma
Edith Ware Crawford,	adult	412 E. 15, Pawhuska, Oklahoma
Wahlelle Ware Morse	adult	1101 E 37th Place, Tulsa, Oklahoma

The general character and probable value of said estate is as follows:

surplus cash, trust funds, securities, headright interests, and real estate in excess of $40,000.00.

Election to Take.

Your petitioner, Bernard Beach, is the surviving husband of Daisy Ware Beach, Osage Allottee No. 719, deceased, and reserves the right to elect to take that portion of her estate which would come to him as such surviving husband under the law of succession of the state of Oklahoma and hereby asserts said right and announces his election to take that portion of the estate of said decedent which would be his as such surviving husband under the law of succession of the state of Oklahoma.

Wherefore, petitioner prays that upon hearing hereof said Will be admitted to probate and letters of ad-

ministration with the will annexed issued to said Paul A. Comstock.

BERNARD E. BEACH
Petitioner

Filed Apr 6, 1950

Order Admitting Will to Probate

Now on this 1st day of May, 1950, this matter came on for hearing in regular order upon the petition for probate of will and for the appointment of Johnnie Mohon as administratrix with the will annexed, filed herein by Johnnie Mohon, guardian of Gladys Naomi Ware, and upon the petition of Bernard Beach, the surviving husband, for probate of the will and for the appointment of Paul A. Comstock as administrator with the will annexed, and Johnnie Mohon, guardian of Gladys Naomi Ware, appearing in person and by her attorney, Frank W. Files, and Bernard Beach appeared in person and by his attorneys, Paul A. Comstock and Gray & Palmer, and the court having heard the evidence, and the argument of counsel, and the hour of adjournment being at hand takes said matter under advisement until the 2nd day of May, 1950.

Now on this 2nd day of May, 1950, said matter coming on for decision, and the court being fully advised in the premises, finds:

1. That notice of hearing on the petitions for probate of will were given by posting notices in three public places in Osage County, Oklahoma, and by mail to each and all of the heirs at law and legatees and devisees named in said will, as required by law and by order of the court, and that the hearings on said petitions were duly and regularly continued by order of this court from the 19th to the 20th day of April, and from the 20th day of April to the 1st day of May, 1950.

2. That Jesse J. Worten who was named in said will to act as executor is dead, and that an administrator with the

will annexed should be appointed to administer upon said estate.

3. That the instrument propounded for probate was duly executed by the decedent, and that at the time of the execution thereof said testator was of full age, of sound mind and memory, and was not acting under duress, menace, fraud or undue influence, and that said will was executed in all particulars as required by law, and should be admitted to probate.

4. That Bernard Beach, the surviving husband, has the absolute right to the appointment as administrator, or to nominate the administrator herein, and that his nominee, Paul A. Comstock, should be appointed as administrator with the will annexed.

It Is Therefore, ordered, adjudged and decreed by the court that said instrument be admitted to probate as and for the Last Will and Testament of the said Daisy Ware Beach, deceased, and that the same be and hereby is established as a valid will, passing both real and personal estate, and that Paul A. Comstock be, and he is hereby appointed as the administrator with the will annexed upon his taking and subscribing to the oath of office required by law, and executing a bond to the State of Oklahoma in the penal sum of Two thousand dollars and upon approval thereof as required by law.

To the order appointing Paul A. Comstock as administrator Johnnie Mohon, guardian of Gladys Naomi Ware, excepts and exception is allowed.

(sgd) L. F. Roberts
County Judge (SEAL)

O.K. Paul A. Comstock
Gray & Palmer
Attorneys for Bernard Beach

O.K. as to form (sgd) F. W. Files
Attorney for Johnnie Mohon, Guardian of Gladys Naomi Ware.

Filed May 2 1950

Petition for Determination of the Heirs

Come now Paul A. Comstock, administrator with the will annexed of the estate of Daisy Ware Beach, Osage Allottee No. 719, deceased, and Bernard Beach, the surviving husband of said decedent, and state to the court.

1. That said decedent died on the 18th day of May, 1949, leaving a will by the terms of which she left to her surviving husband the sum of $1.00 and to her son Theodore Hazelbaker the sum of $1.00, and the remainder of her estate to her sister Gladys Naomi Ware, and that the said surviving husband has filed his election to take under the law of descent and succession instead of under the will of decedent.

2. That the decedent died seized and possessed of the real estate, cash, securities, trust funds, personal property and 2.50011 Osage headrights as set forth in the inventory and appraisement on file in the above entitled matter, and left surviving her as her sole and only heirs at law her surviving husband, Bernard Beach, and her son Theodore Hazelbaker.

WHEREFORE, these applicants pray that the heirs of the said Daisy Ware Beach be determined, and that distribution of the assets of her estate be made in accordance with such determination.

(sgd) PAUL A. COMSTOCK
Administrator with the Will annexed.

(sgd) BERNARD E. BEACH
Surviving husband of Daisy Ware Beach

Filed Jul 16, 1951

Answer to Petition for Determination of Heirs

Come now Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, legal guardian of Gladys Ware, and for answer to the petition for determination of heirs filed in said cause on July 16th, 1951, by Paul A. Comstock, administrator with will annexed of said estate, and Bernard E. Beach, surviving husband of Daisy Ware Beach, allege and state:

1. That Daisy Ware Beach at the time of her death was a restricted full blood member of the Osage Tribe of Indians, her allotment number being 719; that said decedent had never been granted a certificate of competency; that all real estate owned by the decedent at the time of her death and all cash and securities held by and under the supervision of the Secretary of the Interior and the mineral interest or headrights owned by the decedent at the time of her death are all restricted and subject to the laws of the United States of America applicable to members of the Osage Tribe of Indians.

2. That Daisy Ware Beach and Bernard E. Beach were married subsequent to February 27th, 1925.

3. That Section 7 of the Act of Congress approved February 27, 1925, provides as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: Provided, That this section shall not apply to spouses under existing marriages."

That the above mentioned Section of the Act of February 27, 1925, was amended by the Congress of the United States of America, which said amendment was approved September 1, 1950, and is in words and figures as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011) which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section after the comma following the word "Provided" and inserting in lieu thereof the following: "That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) No claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. Provided further, That this section shall not apply to spouses under marriages existing on February 27, 1925."

4. That the said Bernard E. Beach, husband of said decedent, has never filed a formal pleading herein alleging that he is of Indian blood.

5. That by reason of the foregoing allegations the said Bernard E. Beach is precluded by law from succeeding to any part of said estate unless he establishes that he is a citizen of the United States and is of Indian blood and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal ancestor so enrolled.

WHEREFORE, having fully answered, Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, legal guardian of Gladys Ware, pray that said estate be distributed in accordance with the provisions of the will of said deceased.

F. W. FILES
Attorney for Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, legal guardian of Gladys Ware

Filed Mar 24 1952

Excerpts From Transcript of Testimony

The Court: That if he had the right it came into effect immediately upon her death?

Mr. Gray: That is our position, yes, sir, that he had already inherited.

Mr. Files: Mr. Gray's contention might have been true had she died intestate but she died testate and left a will.

* * *

C-M 1255 By Mr. Gray:

Q. You may state your name.
A. Bernard Beach.
Q. Bernard, you and Daisy Ware were married?
A. Yes sir.
Q. When?
A. August 19th, 1934.

C-M 1257 By Mr. Files:

Q. Mr. Beach, your wife was an allotted member of the Osage Tribe?
A. Yes sir.
Q. And she was a restricted Indian, wasn't she?
A. Yes sir.

Order Approving Final Account of the Administrator: Determining the Heirs and Directing Distribution of Estate

Now on this 3rd day of December, 1952, this matter came on for hearing upon the final account of Paul A. Comstock, administrator with will annexed of the estate of Daisy Ware Beach, Osage Allottee No. 719, deceased, and upon the petition for determination of the heirs and for distribution of the estate of decedent, and for a widower's or family allowance to Bernard Beach, the surviving husband of the decedent, and upon the election of the surviving husband, Bernard Beach, to take a husband's share of the estate under the law of the State of Oklahoma, and said administrator appeared in person and by his attorneys,

Gray & Palmer, and Bernard Beach appeared in person and by his attorneys, Paul A. Comstock and Gray & Palmer, and Gladys Naomi Ware appeared by her guardian, Johnnie Mohon, and by her attorney, Frank W. Files, and Johnnie Mohon, guardian of Gladys Naomi Ware, appeared in person and by her attorney, Frank W. Files, and the court having heard all of the evidence and the argument of counsel and upon consideration thereof, finds:

1. That due and legal notice of the hearing on the final account of the administrator with will annexed, and on the petition for determination of the heirs and for distribution of the estate of decedent was given as required by law, both by publication of the notice for the required length of time in the Osage County News, a newspaper published weekly and of general circulation in Osage County, Oklahoma, and by posting notice in three public places in Osage County, Oklahoma, one of which said notices was posted at the front door of the court house in the City of Pawhuska, Oklahoma, all as required by law. That said notice was also duly served upon the Superintendent of the Osage Agency at Pawhuska, Oklahoma.

2. That due and legal notice to creditors was given *as* as required by law, and that the time for filing claims against said estate has long since expired, and that all claims against said estate have been fully paid and satisfied, and there are no suits pending against said estate.

3. That all federal and state estate taxes, and income taxes, and all ad valorem or municipal taxes have been paid and there are no taxes due and owing by said estate.

4. That the hearing on the above matters was originally set for the 15th day of August, 1951; and that continuances have been legally and properly made from said time up until this date by regular orders of this court.

5. That this court has read a transcript of the record and a transcript of the testimony, and heard evidence, and is fully advised in the premises.

6. That the final report of the administrator filed on July 16, 1951, and the supplemental report filed on April 2, 1952, show total receipts in the sum of $8,456.68, and disbursements in the sum of $8421.18, leaving a balance of cash on hand of $35.50; and that said administrator has received and expended the additional sum of $756.01 since the time of the filing of the supplemental report, making a total received in the sum of $9,212.69, and a total disbursement of $9177.19, leaving a balance of cash on hand in the sum of $35.50.

7. That the report of the administrator is true and correct and should be approved and allowed.

8. That the administrator soon after his appointment had an inventory made of all the assets of the estate of said decedent, to-wit:

Southeast quarter of Southwest quarter, of Section 15, Township 28, Range 6, appraised at	$1000.00
Lot 2 of section 4, Township 25, Range 8 appraised at	944.25
North half of Southeast quarter, and South half of Southeast quarter of Northeast quarter, and North half of Northeast quarter, and Southwest quarter of Northeast quarter, and Northwest quarter of Southeast quarter of Northeast quarter, and West half of Northeast quarter of Southeast quarter of Northeast quarter, of Section 23, Township 23, Range 11; appraised at	1850.00
Southeast quarter of Southwest quarter, of Section 34, Township 24, Range 9; appraised at	600.00
Southwest quarter, and Southwest quarter of Northwest quarter of Southeast quarter, and South half of Northwest quarter of Northwest quarter of Southeast quarter, of section 25, Township 23, Range 10, appraised at	$937.50
South half of Southwest quarter, of section 28, and North half of Northwest quarter, of section 33, Township 26, Range 8, appraised at	3800.00.
South half of Northwest quarter, and North half of Southwest quarter, of section 28, Township 26, Range 8, appraised at	8500.00

(Homestead) Lots 13, 14, 15, 16 block 43 of Prudom Addition to the City of Pawhuska, Oklahoma, appraised	5000.00
Furniture	654.50
Cash at Osage Agency	16451.62
Securities at Agency	4600.00
Trust funds at Agency	5853.18
2.50011 Osage Headrights	18750.83.

9. That the administrator with will annexed is entitled to the statutory fee in sum of $330.50 and is entitled to an additional fee of $330.54 for evtraordinary services, making a total of $661.08.

10. That Gray & Palmer, lawyers, have represented the administrator with will annexed and performed the duties as such attorneys and are entitled to be paid a fee for their services and that such fee amounts to $1732.21; and that said attorneys are entitled to an additional fee in the sum of $500.00 for extraordinary services rendered in defending an appeal taken to the Supreme Court of the State of Oklahoma, making a total of $2232.21.

11. That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on May 18, 1949, leaving as her next of kin and sole and only heirs at law her husband, Bernard Beach, and an adopted son, Theodore Eugene Hazelbaker, but that the said Bernard Beach is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of the restricted estate of his said deceased wife, and the adopted son has made no contest of the will of decedent, and the estate of decedent descends under the terms of said will, which is in words and figures as follows, to-wit:

"WILL. I Daisy Ware Beach, Osage Allottee No. 719, of Pawhuska, Oklahoma, being now in good health, strength of body and mind but sensible of the uncertainty of life and desiring to make disposition of my property and affairs while in health and strength, do hereby make,

publish and declare the following to be my last will and testament, hereby revoking and cancelling all other or former wills by me at any time made.

"First: I direct the payment of all my just debts and funeral expenses.

"Second: I give to my husband, Bernard E. Beach, the sum of One Dollar ($1.00).

"Third: I give to my son, Theodore Eugene Hazelbaker, the sum of One Dollar ($1.00).

"Fourth: All the rest and residue of my property, real and personal, of every kind and wherever situated, whether vested or contingent at the time of my death, I devise and bequeath to my sister, Gladys Naomi Ware.

"I further direct that my executor sell such of my property, both personal and real, as can be sold and that at the closing of my estate the funds derived from the sale thereof be deposited to the account of Gladys Naomi Ware at the Osage Indian Agency, to be disbursed by approval of the Secretary of the Interior to and for the benefit of Gladys Naomi Ware as her needs may require.

"Fifth: I hereby appoint and designate Jesse J. Worten sole executor of this, my last will and testament.

"I am not leaving my husband, Bernard E. Beach, and my son, Theodore Eugene Hazelbaker, a greater sum because of the fact that I feel that I have provided well for both of them during my lifetime.

"In witness whereof, I, Daisy Ware Beach, have to this my last will and testament, subscribed my name this 20 day of August, 1946, at Pawhuska, Oklahoma. Daisy Ware Beach."

(attestation omitted).

and that said will has been duly and regularly admitted to probate by the County Court of Osage County, Oklahoma,

and that the estate of decedent descended and vested in accordance with the terms thereof.

12. That the said Daisy Ware Beach died leaving no father or mother, and no child of a deceased child, and left as her sole and only heirs at law her surviving husband, Bernard E. Beach, and an adopted son, Theodore Eugene Hazelbaker, but that she died leaving a will and that her estate descends and vests in accordance with the terms of said will.

13. That the surviving husband, Bernard E. Beach, filed herein his election to take against said will and under the laws of the State of Oklahoma, but that the said Bernard E. Beach is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of said restricted estate; and the son, Theodore Eugene Hazelbaker, has made no contest of the will of decedent, and the said estate of decedent descends under the terms of said will.

14. That the said Daisy Ware Beach, Osage Allottee No. 719, died seized and possessed of all of the real estate and property as above herein described in paragraph numbered 8, and that after the payment of the bequests of $1.00 each to the surviving husband and surviving son, all of the estate of decedent, whether described herein or not, descended to and became the property of Gladys Naomi Ware under the will of said decedent and that title to the same should be vested in her and said estate distributed to her.

15. That the said surviving husband, Bernard E. Beach, is not entitled to a widower's or family allowance from the funds of said estate.

16. That the balance of the court costs should be paid and upon distribution of said estate and payments of the fees and costs as herein directed said administrator be finally discharged.

17. That copies of all jurisdictional papers filed herein have been served upon the Superintendent of the Osage Agency.

IT IS, THEREFORE, ORDERED, adjudged and decreed by the court as follows:

That due and legal notice of this hearing was given as required by law, and that proper continuances were had by orders of this court from time to time until this date; and that due and legal notice to creditors was given as required by law, and that all claims against said estate have been fully paid and there are no suits pending against said estate.

That there are no federal estate or income taxes due or owing, and no State inheritance or income taxes due and owing and there are no ad valorem or municipal taxes due or owing by said estate.

That the final account of the administrator with will annexed, and the supplemental account, be, and are hereby approved and allowed, and said administrator with will annexed has properly accounted for all funds received by him.

That the administrator with will annexed soon after his appointment caused an inventory of the property of said estate to be made as required by law.

That the administrator with will annexed be and is hereby allowed the statutory fee of $330.50, and an additional fee of $330.54 for extraordinary services, or a total of $661.08 and he is authorized and directed to pay said fee.

That Gray & Palmer, attorneys for the administrator with will annexed, be and are allowed a fee for their services of $1732.21, and an additional fee of $500.00 for extraordinary services, of a total of $2232.21, and said administrator with will annexed is hereby authorized and directed to pay said fee.

That the administrator with will annexed pay the balance of the court costs due and owing.

That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on the 18th day of May, 1949, leaving as her sole and only heirs at law a surviving husband, Bernard E. Beach, and an adopted son, Theodore Eugene Hazelbaker, but leaving a will, which is hereinabove set out in full, under the terms of which, after payment of bequests of $1.00 to each the surviving husband and surviving adopted son, the entire estate of decedent, whether described herein or not, descended to and vested in Gladys Naomi Ware, the beneficiary named in the residuary clause of said will, and the said Gladys Naomi Ware is hereby declared and decreed to be the owner thereof, sand said estate is hereby distributed to her, including all of the real estate and property as above herein described in paragraph numbered 8.

That Bernard Beach, the surviving husband of decedent, is not of Indian blood and under the Act of Congress relative to the Osages is not entitled to inherit any portion of the restricted estate of said decedent; and the said Bernard Beach is not entitled to a widower's or family allowance from the estate of decedent.

That upon making the payments as herein ordered the said administrator and his bondsmen be fully and finally discharged.

To the finding and allowance of fees for extraordinary services to said administrator, and to his attorneys, the said Gladys Naomi Ware excepts.

To the finding and judgment of the court denying his right to inherit any portion of the estate of his deceased wife, and denying his right to receive a widower's or family allowance from said estate, the said Bernard Beach excepts, and gives notice in open court, in the presence of the court and in the presence of opposing counsel, of his

intention to appeal to the district court of Osage County, Oklahoma, and requests that the amount of appeal bond be fixed.

The Court thereupon fixes the amount of the bond upon appeal from the order denying the right to inherit from the estate at the sum of $100.00, and the bond upon the appeal from the order denying a widower's or family allowance at the sum of $100.00.

(sgd) E. H. MATTINGLY
County Judge

Filed Dec 9 1952

No. 19,694

IN THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA

In the matter of the Estate of Daisy Ware Beach, Osage Allottee No. 719, deceased.

Order Determining Heirs, Fixing Family Allowance, and Directing Distribution of the Estate

On the 5th day of January, 1954, this matter came on for trial de novo upon the application of the administrator with will annexed of the estate of Daisy Ware Beach, Osage Allottee No. 719, deceased, for determination of the heirs and for the distribution of the estate, and upon the application of Bernard E. Beach, the surviving husband, for a family or widower's allowance, and upon the election of the said surviving husband to take a husband's share of the estate under the law of descent and distribution of the State of Oklahoma, and the said administrator appeared in person and by his attorneys, Gray & Palmer, and Bernard E. Beach appeared in person and by his attorneys, Paul A. Comstock and Gray & Palmer, and Gladys Naomi Ware appeared by her guardian, Johnny Mohon and by her attorney, Frank W. Files, and Johnny Mohon, guardian of Gladys Naomi Ware appeared in person and by her at-

torney, Frank W. Files, and thereupon the court proceeded to hear the evidence and argument of counsel and the trial not being completed it was continued from day to day until the 13th day of January, 1954, and on said 13th day of January, 1954, the evidence was completed and all parties rested, and the matter was continued for argument to the 25th day of January, 1954, and on the 25th day of January, 1954, argument was had and the court took the matter under advisement and continued it to the 27th day of January, 1954.

Now on this 27th day of January, 1954, all parties being present as heretofore, and the court being fully advised in the premises and upon consideration thereof, finds:

1. The issues generally in favor of the surviving husband, Bernard E. Beach.

2. That Allen W. or A. W. Comstock, the grandfather of Bernard E. Beach, was of Indian blood and that Bernard E. Beach is of Indian blood and is, under his election to take under the laws of descent and distribution of the State of Oklahoma, entitled to and did inherit one-half of the estate of the said Daisy Ware Beach, Osage Allottee No. 719, deceased.

3. That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on the 18th day of May, 1949, and left as her next of kin and sole and only heirs at law her husband, Bernard E. Beach, and an adopted son, Theodore Eugene Hazelbaker, but that the said Daisy Ware Beach left a will which devised and bequeathed to said adopted son, Theodore Eugene Hazelbaker only $1.00, and that said adopted son has made no contest of the will of said decedent, and that her estate descends one-half to the surviving husband, Bernard E. Beach, under the laws of the State of Oklahoma, and one-half under the terms of the will of decedent, which is to say $1.00 to Theodore Eugene Hazelbaker and the re-

mainder to Gladys Naomi Ware, the surviving sister of said decedent, after the deduction of the said bequest of $1.00 to the adopted son.

4. That the said decedent died leaving no father or mother and no child or child of a deceased child, and left as her sole and only surviving heirs at law her husband, Bernard E. Beach, and her adopted son, Theodore Eugene Hazelbaker, but that she left a will and her estate descends under the will of decedent and under the election of the surviving husband to take under the laws of the State of Oklahoma, as hereinabove found.

5. That the surviving husband, Bernard E. Beach, was at the time of the death of the said Daisy Ware Beach, and is at this time, without property and that he is entitled to a widower's or family allowance from the funds belonging to said estate from the date of the death of the said Daisy Ware Beach and that $100.00 a month is a fair and reasonable allowance and that the same should be allowed to him.

It Is, Therefore, ordered, adjudged and decreed by the court as follows:

That Bernard E. Beach, the surviving husband of Daisy Ware Beach, Osage Allottee No. 719, deceased, is of Indian blood and is, under his election to take under the laws of descent and distribution of the State of Oklahoma, entitled to and did inherit one-half of the estate of the said decedent.

That Bernard E. Beach, the surviving husband of the decedent, Daisy Ware Beach, is entitled to receive a widower's or family allowance from the date of the death of said decedent of $100.00 a month, and such allowance is hereby granted and allowed to him from the funds belonging to said estate.

That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on the 18th day of

May, 1949, leaving as her sole and only heirs at law her surviving husband, Bernard E. Beach, and her adopted son, Theodore Eugene Hazelbaker, but leaving a will, and that her estate descends one-half to Bernard E. Beach, the surviving husband, under his election to take under the laws of the State of Oklahoma, and the remaining one-half passes under the will and by the terms of said will $1.00 to Theodore Eugene Hazelbaker and the remainder of said one-half to Gladys Naomi Ware, and that the said Bernard E. Beach be and is hereby declared and decreed to be the owner of one-half of the estate of said decedent, and Gladys Naomi Ware be and is hereby declared and decreed to be the owner of the remaining one-half of the estate of said decedent, after the payment of $1.00 to Theodore Eugene Hazelbaker.

That Daisy Ware Beach left no child or child of a deceased child, and no father or mother, and left no other heirs at law except as above set forth, and that no other person has any right, title or interest in and to her estate.

It is further ordered that this case be, and is hereby remanded to the County Court of Osage County, Oklahoma, with directions to carry out the Judgment herein rendered.

To all of which findings and judgment of the court the said Gladys Naomi Ware, and Johnny Mohon, guardian of Gladys Naomi Ware, except and exceptions are allowed.

(sgd) HUGH C. JONES
District Judge.

Filed Feb 15, 1954

[Filed June 25, 1957.]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 36,581

GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian ,and JOHNNIE MOHON, as legal guardian of Gladys Naomi Ware, an incompetent person, *Plaintiffs in Error,*

vs.

BERNARD E. BEACH, *Defendant in Error*

Syllabus

1. The amendatory Act of Congress of September 1, 1950, (64 Stat. 572) restricting inheritance from those who are of one-half or more Osage Indian blood to heirs of Indian blood who are citizens of the United States and are enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or have a lineal Indian ancestor so enrolled, does not apply where the death of the Osage Indian occurred in 1949 and the right of inheritance had already vested in a statutory heir of Indian blood who was not enrolled and had no enrolled lineal Indian ancestor. The right of inheritance in such case is controlled by the Act of Congress of February 27, 1925, (43 Stat. 1008), which was the substantive law pertaining to such inheritance in effect at the time of the death of such Osage Indian and which act only required such heir to be of Indian blood and did not require such heir to be a citizen and either enrolled or to have an enrolled lineal Indian ancestor.

2. The rule as to proof of race-ancestry is not so strict as the rule as to proof of pedigree which confines evidence of reputation to "general repute in the family", and proof of the general reputation in the community concerning the race of a member of the community is competent evidence on the question of race-ancestry.

3. Evidence of declarations of a deceased person, made during his lifetime, concerning his race, is admissible on the question of race-ancestry.

4. Record examined and held that finding of trial court that surviving husband of deceased Osage Indian was of Indian blood, and therefore entitled to inherit statutory portion of estate, was not against the clear weight of the evidence.

5. Admission of incompetent evidence in a cause of equitable nature tried to the court is not ordinarily reversible error where the judgment is not clearly against the weight of the evidence and it does not appear that the complaining party has been in any way prejudiced by the admission thereof.

6. The granting of a family allowance during the pendency of administration proceedings is exclusively the creature of statute. The controlling statute in such case is 58 O.S. 1951, § 314, which provides for an allowance for the support of the surviving spouse, without regard to whether such surviving spouse be the wife or the husband.

7. The amount of allowance for support of a decedent's family during the pendency of administration proceedings rests largely within the discretion of the county court and of the district court when tried de novo on appeal, and unless such discretion has been abused its action will not be disturbed.

Appeal From The District Court of Osage County, Oklahoma

Hon. Hugh C. Jones, *Judge.*

Appeal From Decree Determining Heirs and Distributing Estate of Deceased Osage Indian and From Order Granting Family Allowance to Surviving Husband From Such Estate.

AFFIRMED

F. W. FILES,
Pawhuska, Oklahoma, For Plaintiffs in Error

CHAS. R. GRAY, W. N. PALMER,
PAUL A. COMSTOCK,
Pawhuska, Oklahoma, For Defendant in Error.

WILLIAMS, J:

Daisy Ware Beach, Osage allottee No. 719, died on May 18, 1949. At the time of her death she was survived by her husband, Bernard Beach, to whom she had been married since August 19, 1934, an adopted son, Theodore Eugene Hazelbaker, and a maiden sister Gladys Naomi Ware, an incompetent person. Decedent left a will dated August 20, 1946, under the provisions of which all of her property was devised and bequeathed to her incompetent sister, Gladys Naomi Ware, with the exception of $1.00 which was bequeathed to her husband, and $1.00 to her adopted son.

On April 6, 1950, the surviving husband, Bernard Beach, filed his petition for probate of said will, and at the same time filed his election to take that portion of the estate which would be his as such surviving husband under the statutes of descent and distribution of the State of Oklahoma rather than under the will. The guardian of Gladys Naomi Ware challenged the husband's right to elect to take under the law on the grounds that he was not of Indian blood and, therefore, could not inherit his wife's Osage estate under the Osage Acts of Congress. It should be here noted that the entire estate of Daisy Ware Beach, deceased, consisted of restricted lands, moneys and headrights, or mineral interests, of a total value of some $68,000.

Upon a hearing being held in the matter, the county court determined that Bernard Beach was not of Indian blood and was therefore not entitled to inherit and was

not entitled to a widower's or family allowance from the estate of descent and entered a decree of distribution accordingly. Beach appealed to the district court where, after a trial de novo, judgment was rendered reversing the county court, and determining that Beach was of Indian blood and was therefore entitled to inherit and to a widower's allowance. This appeal from such judgment of the district court has been perfected by Johnnie Mohon as guardian of Gladys Naomi Ware, an incompetent person, hereinafter referred to as plaintiff in error.

As her first proposition of error, plaintiff in error contends that Bernard Beach, husband of Daisy Ware Beach, deceased, cannot succeed to any part of the estate of his wife since his purported proof of Indian blood wholly fails to meet the requirements of the Act of Congress approved September 1, 1950.

The Act of Congress of February 27, 1925 (43 Stat. 1008) dealt with restrictions with relation to lands and funds of the Osage Indians. Section 7 of such Act provided as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interest of the Osage Tribe: Provided, That this section shall not apply to spouses under existing marriages."

This section was in effect at the time of the marriage of Daisy Ware Beach and Bernard Beach in 1934, at the time of the death of Daisy Ware Beach in 1949, and at the time Bernard Beach filed his election to take under the law rather than under the will on April 6, 1950. Such section was amended, however, on September 1, 1950, by Act of Congress of that date, (64 Stat. 572), so that as amended such section now provides as follows:

"Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: Provided, That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States, and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. Provided further that this section shall not apply to spouses under marriages existing on February 27, 1925."

Since Beach admittedly did not establish that he is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior or has a lineal ancestor so enrolled, as required by the amendment of September 1, 1950, relied upon by plaintiff in error, the question actually presented by the first proposition is whether such amendment is applicable to the instant case.

Plaintiff in error contends that the amendment of September 1, 1950, merely established a rule of evidence and that a statute which applies to procedure only is given a retrospective effect, unless it appears that the Legislature intended it should operate prospectively only; that Congress obviously intended such amendment to be retrospective in application else it would not have inserted the clause referring to pending proceedings in which a claimant had filed a formal pleading alleging Indian blood; that Bernard Beach had not filed a formal pleading alleging that he was of Indian blood at the time of the adoption of such amendment and that such amendment was therefore applicable to this case.

We are unable to subscribe to plaintiff in error's theory that the 1950 amendment merely prescribed an exclusive method of proving Indian blood and was therefore a rule of evidence rather than substantive law.

There are many persons who are undeniably of Indian blood who are not enrolled on any roll prepared under the direction of the Secretary of the Interior and who have no lineal ancestor so enrolled. On the other hand, many intermarried whites and negro freedmen were made members of the various Indian tribes and were enrolled on the tribal rolls even though not a single drop of Indian blood flowed through their veins. Obviously, then, the possession of Indian blood and the appearance of the name on the rolls above referred to are not synonymous, and the proof of one would not constitute proof of the other. Under the Act of 1925, supra, as it existed prior to the 1950 amendment, any heir of Indian blood, regardless of the quantum or source thereof, and regardless of the citizenship of such heir and whether such heir were enrolled or unenrolled, could inherit from a restricted Osage Indian. See In re Ham's Estate, 186 Okl. 610, 99 P. 2d 895. By virtue of the amendment of 1950, supra, however, only those heirs of Indian blood who are citizens of the United States and who are enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior or have a lineal Indian ancestor so enrolled, can inherit from a restricted Osage Indian. Such amendment simply denies non-citizen heirs of Indian blood and unenrolled heirs of Indian blood the right to inherit from an Osage Indian. Since such heirs could and did inherit prior to such amendment, the same constituted a change in the substantive law rather than mere procedure.

It is well established in this jurisdiction that property descends upon death and vests immediately in the heirs, legatees and devisees, subject only to control of the county court for purposes of administration. 84 O.S. 1951, § 212;

84 O.S. 1951, § 175; Seal v. Banes, 168 Okl. 550, 35 P. 2d 704; Parks v. Lefeber, 162 Okl. 265, 20 P. 2d 179; 86 A.L.R. 392. Since one has a vested right in property to which he succeeds under the law of descent and distribution or under the will of a decedent immediately upon the death of the decedent, it follows that an estate must be distributed among heirs and distributees according to the law as it exists at the time of death of the decedent. 16 Am. Jur. 782 and 786, Descent and Distribution, §§ 15 and 20.

We are therefore of the opinion and hold that the right of Bernard Beach, as surviving spouse, to succeed to his statutory share of the estate of Daisy Ware Beach, deceased, vested immediately upon the death of Daisy Ware Beach in 1949, and is controlled by the substantive law pertaining thereto as it existed at that time, namely, the Act of Congress of February 27, 1925, above quoted, as it existed prior to the 1950 amendment, supra. The amendment of September 1, 1950, is not applicable to this case, and the trial court did not err in so holding.

As her second proposition, plaintiff in error contends that the admission of testimony that the general reputation of A. W. Comstock was of Indian blood was erroneous and was prejudicial and that the admission of statements by A. W. Comstock to various persons stating that he was of Indian blood was erroneous and prejudicial.

A. W. Comstock was the grandfather of Bernard Beach. Obviously, if A. W. Comstock was of Indian blood, his grandson, Bernard Beach, would likewise be of Indian blood, although of small quantum. A number of witnesses testified as to the general reputation in the community of A. W. Comstock as being of Indian blood. It is such testimony that plaintiff in error contends is incompetent and the rule set out in Frank v. Harjo, 142 Okl. 157, 286 P. 14, to the effect that in cases involving pedigree, the general rule is that general repute, in the family only and

not the common reputation in the community, is admissible to prove pedigree, is cited in support thereof. The rule and cases cited by plaintiff in error are correct, but are not applicable here. The question here involved is, strictly speaking, race or race-ancestry rather than pedigree. The rule as to proof of race ancestry is not so strict as the rule as to proof of pedigree. Evidence as to the general reputation in the community concerning the race of a member of the community is competent. 20 Am. Jur. 416, Evidence, § 475; Cole v. District Board, 33 Okl. 692, 123 P. 426; White v. Holderby, 192 F. 2d 722; State v. Miller, (N.C.) 224 N.C. 228, 29 S.E. 2d 751; Gilliland v. Board of Education (N.C.) 141 N.C. 482, 54 S.E. 413; Hudgins v. Wrights, (Va.) 1 Hen. & M. 134; Pegram v. Isbell, (Va.) 2 Hen. & M. 193; Vaughan v. Phebe, (Tenn.) Mart & Y. 4, 17 Am. Dec. 770; White v. Clements, (Ga.) 39 Ga. 232; and annotations at 15 ALR 2d 1443 and Ann. Cas. 1914 A, 462. The court, therefore, did not err in the admission of such evidence.

Several witnesses testified that A. W. Comstock, during his lifetime, had often stated that he was of Indian blood. Plaintiff in error says that admission of such testimony was erroneous and prejudicial, but no cases are cited in support of such position and we know of none.

The only authorities we have found hold that the declarations of a deceased person concerning his race are admissible. See in this connection 20 Am. Jur. 416, Evidence, § 475, and annotations at Ann. Cas. 1914 A. 462. We therefore find no merit in the second proposition.

As her third proposition, plaintiff in error contends that Bernard Beach failed to sustain the burden of proof imposed upon him by law and that upon a proper consideration and evaluation of the evidence as a whole judgment should have been for appellant. In other words, plaintiff in error contends that the trial court's finding

that Beach is of Indian blood is against the clear weight of the evidence. We do not agree.

Due to the voluminous character of the evidence presented by the parties it will not be delineated in detail herein. The testimony of approximately 70 witnesses was presented, either by deposition or in person, and numerous exhibits in the nature of photographs, letters, genealogical charts, death certificates, and various and sundry other documents, were introduced in evidence and placed in the record. Some 50 or more of these witnesses testified concerning the physical characteristics and appearance of A. W. Comstock, the grandfather of Bernard Beach, with particular reference to what they termed his Indian appearance. Some 37 witnesses testified that A. W. Comstock, during his lifetime, had on numerous occasions declared himself to be of Indian blood. At least 5 witnesses testified that Richard Emerson Comstock, the father of A. W. Comstock, had during his lifetime, declared that he was of Indian blood. The physical appearance of Richard Emerson Comstock, Homer Comstock (son of A. W. Comstock), and Wilmer Comstock (brother of A. W. Comstock), was detailed by a number of witnesses and several photographs were introduced. Eva Comstock, widow of A. W. Comstock, and three of their children, Cleo, Homer and Paul, all testified that A. W. Comstock was of Indian blood, as did Bernard Beach. The tradition or reputation in the family of Indian blood going back as far as Rhoda Emerson Comstock, the mother of Richard Emerson Comstock, was established by numerous witnesses. Various and sundry other corroborative items or events, too numerous to detail here, were testified to by various witnesses. It is true that there are inconsistencies between the testimony of the various witnesses. Many of these witnesses, however, were elderly persons testifying concerning events and conversations occurring 50 or more years ago. Such inconsistencies are naturally to be expected in such testi-

mony, and an absence thereof would reflect upon the credibility of such witnesses more than does their presence.

As above indicated, we have not undertaken to review in this opinion all of the evidence reflected by the record. We have, however, read and analyzed all of the proof with the aid of the comprehensive briefs presented by the parties. From our examination of the record we are impelled to conclude that the finding of the trial court that Bernard Beach is possessed of Indian blood is not against the clear weight of the evidence.

As her fourth proposition plaintiff in error complains of the admission in evidence of a written memorandum alleged to have been made by Leland E. Gorton prior to the taking of his deposition by the claimant. The making of the memorandum in question and its introduction in evidence, apparently came about in the following manner. Plaintiff in error took the deposition of Leland E. Gorton in the summer of 1952. About a year later the attorneys for Bernard Beach contacted Mr. Gorton and took his deposition. After this deposition was offered in evidence, these attorneys testified that they had seen Mr. Gorton and talked with him on two occasions and that Mr. Gorton wrote down a brief statement on the first occasion and on a later occasion wrote down a second brief statement on the same sheet of paper. This sheet of paper was offered in evidence, and the writing thereof is as follows:

> "About the year 1910—Henry Downer, son of Esther Emerson was visiting my grandmother Isbella Gorton and I remember her saying there was a strain of Indian blood in his line, that my grandfathers in his line *married an Indian squaw.*
>
> "About the year 1910 when I was 10 years old Henry Downer son of Esther Emerson Downer was visiting my grandmother, Isabella Gorton and I remember her saying that there was a strain of Indian blood in his line, that my grandfather's (Edward Gorton) grandfather *married an Indian Squaw.*"

We do not know upon what theory the above writing was admitted in evidence and we know of no theory under which it would be competent evidence or have any probative value. Mr. Gorton testified in detail concerning the subject matter of the statement and was thoroughly cross-examined thereon. It does not appear to us that the statement in question either adds to or detracts from such testimony in any way. Such being the case, the admission thereof, while error, could only be harmless error. Plaintiff in error does not suggest that she was in any way prejudiced by the admission of such statement or that the trial court relied thereon in reaching its conclusion. The admission in evidence of such statement therefore does not constitute reversible error. Travis v. McCully, 186 Okl. 378, 98 P. 2d 595; Liles v. Bigpond, 190 Okl. 112, 121 P. 2d 596.

As her last proposition, plaintiff in error asserts that the granting of a family allowance to Bernard Beach was wholly unwarranted both under the facts and under the law.

58 O.S. 1951, § 311, provides that the surviving spouse may continue to possess and occupy the homestead and that it is not subject to administration, and also provides that certain enumerated and described property shall be delivered to the surviving spouse.

58 O.S. 1951, § 312 provides that in addition to the property mentioned in section 311, supra, all property or money that is exempt by law from levy and sale on execution or other final process shall be allowed and set apart to the surviving spouse.

58 O.S. 1951, § 314 provides for an additional allowance for maintenance during the settlement of the estate, and reads as follows:

> "If the amount set apart as aforesaid be less than that allowed, and insufficient for the support of the

surviving spouse and children, or either, or, if there be no such personal property to be set apart, and if there be other estate of the decedent, the court may in its discretion make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary; or of administration."

There can be no doubt but that, under the foregoing statute, a family allowance may be paid to a surviving husband as well as to a surviving wife. Such statute as originally adopted (R. L. 1910, § 6331) authorized a family allowance for the support of widow and children. We held in the case of Stuart v. Schoonover, 104 Okl. 28, 229 P. 812, that the statute as then worded did not include the husband and that a family allowance was therefore not authorized for a surviving husband. The legislature shortly thereafter, and in 1925, amended such statute to its present form, above set out, so that it now refers to surviving spouse rather than widow, and obviously includes either husband or wife.

The power to grant a family allowance is purely and exclusively the creature of statute. The controlling statute is above set out. There is nothing therein indicating or providing that a family allowance to a surviving husband be upon any different basis or subject to different rules than such an allowance to a surviving wife.

We have held that a widow is entitled to an allowance out of the estate of her deceased husband for her support during administration, even though she has property of her own out of which she may support herself. In re Crane's Estate, 201 Okl. 354, 206 P. 2d 726. We have also held that the amount of allowance for support of deceased's family during administration rests largely within the discretion of the county court and of the district

court when tried de novo on appeal, and unless such discretion has been abused its action will not be disturbed, and that the abuse of judicial discretion which may be corrected on appeal is a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. In re Crane's Estate, supra. We find no such abuse of discretion in the case at bar.

Plaintiff in error suggests that a widow is always entitled to a family allowance because of the legal duty of a husband to support the wife during his lifetime, whereas a wife is only under a legal duty to support the husband when he has no community or separate property and is unable from infirmity to support himself (see 32 O.S. 1951, § 3), and that a husband should therefore be entitled to a family allowance from the deceased wife's estate only when such deceased wife was under obligation to support such husband during her lifetime. The answer to this, of course, is that there is no statute to such effect, and since the right to a family allowance is purely statutory, we would, in order to announce such a rule, have to read it into the statute. We do not think this would be warranted. In re Crane's Estate, supra.

We find no error in the judgment and order appealed from and the same are therefore affirmed.

CORN, V.C.J., and DAVISON, JACKSON and CARLILE, JJ., concur; HALLEY, JOHNSON and BLACKBIRD, JJ., dissent.

February 18, 1958

The Clerk Is Hereby Directed To Enter The Following Orders: 36,581—Gladys Naomi Ware, etc., et al. v. Bernard E. Beach.

Petition for rehearing denied.

EARL WELCH
Chief Justice

March 11, 1958

The Clerk Is Hereby Directed To Enter The Following Orders: * * * 36,581—Gladys Naomi Ware, et al v. Bernard E. Beach. Application for leave to file second petition for rehearing denied.

EARL WELCH
Chief Justice

[Filed March 20, 1958]

Order Issuing Mandate But Staying the Enforcement Thereof

On this 20th day of March, 1958, for good cause shown the mandate of this court herein is ordered issued, but any enforcement of the mandate in the trial court is hereby ordered stayed until July 1, 1958, pending the filing of an appeal by plaintiffs in error in the Supreme Court of the United States, and if said appeal is filed on or before July 1, 1958, enforcement of the mandate shall be further stayed until such time as the Supreme Court of the United States renders a final decision herein, or until further order of this court.

It is further ordered that the nature of the judgment herein as such as not to require the filing of a supersedeas or stay bond on the part of the plaintiffs in error.

Done by order of the Court in Conference this 20th day of March, 1958.

EARL WELCH
Chief Justice

Mandate

THE SUPREME COURT OF OKLAHOMA:

To the Honorable Judge of the District Court of Osage County in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 25 day of June, 1957, render an opinion in the above entitled cause, appealed from the District Court of Osage County.

AFFIRMED

Now, therefore, you are hereby commanded to cause such Affirmance to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said opinion.

Witness, the Honorable Earl Welch, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 20 day of March, 1958.

(sgd) ANDY PAYNE, *Clerk*

By ETHEL C. HAMMETT
Ethel C. Hammett, *Deputy*

[Endorsed]:

Leave is hereby granted to file this 28 day of May, 1958.
EARL WELCH, *Chief Justice*

Motion for Clarification of Judgment

Comes now Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, as legal guardian of Gladys Naomi Ware, an incompetent person, and respectfully moves the Court for a clarification of its judgment affirming the District Court of Osage County in the above matter, to set forth what action of the Court constitutes its "final judgment" referred to in Sec. 1257 of the U.S. Judicial Code (28 U.S.C. Sec. 1257) for the purposes of review in the Supreme Court of the United States.

In support of the foregoing motion, appellants respectfully show to the Court that an opinion was entered in this case on June 27, 1957, which concluded with the statement that "the judgment and order appealed from and the same are therefore affirmed." A petition for rehearing was timely filed pursuant to Rule 28, was set for oral argument and duly argued in January, 1958. On February 18th,

1958, after further consideration, the petition for rehearing was denied. Pursuant to Rule 29 of the rules of this Court, application for leave to file a second petition for rehearing was timely filed which was denied March 11th, 1958. Pursuant to Rule 33, the mandate of this Court then entered on March 20, 1958, pursuant to an order for mandate of the same date which provided that its enforcement should be stayed pending steps for review of the case in the Supreme Court of the United States by these appellants.

In connection with the preparation of a petition for writ of certiorari to be filed in the Supreme Court of the United States, counsel has encountered the decision in *Gypsy Oil Co.* v. *Escoe, etc.*, 275 U.S. 498, a *per curiam* decision of the Supreme Court of the United States denying a petition for certiorari to this court as out of time because not filed within three months of the denial of the first petition for rehearing in this Court, though filed within three months of the denial of the motion for leave to file a second petition for rehearing; that said decision does not show that the Supreme Court of the United States clearly established the date of the final judgment of this Court, from the entry of which the 90 days within which certiorari may be sought commences to run pursuant to Section 2101(c) of the United States Judicial Code (28 U.S.C. Sec. 2101(c)).

That it is the understanding of counsel for appellants that the statement in the opinion is not itself the entry of judgment in this Court, but that the final judgment of this Court equates with the date of the mandate the entry of which is specifically to be withheld under Rule 33 until the disposition of a motion for leave to file a second petition for rehearing or until the time therefor has expired; that it is not believed by counsel for appellants that the specific provisions for a motion for second petition for rehearing in this Court are intended to deny litigants the reviews authorized by Congress in the Supreme Court of the United

States as to federal questions disposed of by this Court; that it is the understanding of counsel for appellants that the rehearing practice in this Court has been deliberately adopted by the Court as a means of improving the administration of justice in this State, and that the purpose of the Court is to hold a final judgment in abeyance until opportunity has been accorded for the exhaustion of that petition for rehearing and motion for second petition for rehearing practice.

Accordingly, it is respectfully requested that the Court clarify the question of what constitutes its "final judgment" or the "entry" of its final judgment under 28 U.S.C. Section 1257(3) and Section 2101(c) of record in this case so that it may be presented to the Supreme Court of the United States in the event the petition for certiorari would not be out of time if filed within 90 days after March 20, 1958.

Respectfully submitted,

FRANK W. FILES
Frank W. Files

[Certificate of service omitted.]

Filed June 3, 1958

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Order Clarifying Date of Final Judgment

Now, on this 3rd day of June, 1958, this matter comes on for hearing before this Court upon the motion of the plaintiffs in error to clarify the date of the final judgment of this court in the above-styled cause.

That on June 25th, 1957, this court filed an opinion affirming the District Court of Osage County, Oklahoma, in the above-styled cause; that thereafter in accordance with rule 28 of this court a petition for rehearing was filed,

and said petition for rehearing was set for argument and such argument heard by this Court on the 7 day of January, 1958; and that thereafter on February 18th, 1958, the petition for rehearing was denied, and within due time allowed by this court an application for a second petition for rehearing was filed pursuant to rule 29 of this court; that the application for second petition for rehearing was denied by this Court on the 11th day of March, 1958;

That all steps authorized before the entry of a judgment had then been exhausted, and this Court as provided by rule [illegible] of this Court issued its judgment in said cause which is a part of its mandate dated March 20th, 1958.

That the judgment of this Court became final on March 20th, 1958, and such mandate was transmitted to the District Court of Osage County, Oklahoma, the trial court in said case; that said mandate was issued under specific rules of the practice of this court whereby the Clerk issues the mandate at the direction of the Chief Justice of the Supreme Court of Oklahoma; that the court considered an application to stay the enforcement of the mandate and final judgment of this court until July 1, 1958, pending the filing of an appeal by the plaintiffs in error wherein the Supreme Court of the State of Oklahoma in its conference of March 20th, 1958, and on said date, directed that the enforcement of said mandate be stayed.

It is, Therefore, Ordered that under the rules of practice before this Court that the judgment in the above-styled cause became final on the 20th day of March, 1958, said date being the date of the issuing of the mandate to the trial court in said cause.

Done by order of this Court in conference this 3rd day of June, 1958.

Earl Welch
Chief Justice

[Certification by Clerk omitted.]

SUPREME COURT OF THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 23rd, 1958, provided the statutory time has not already expired.

/s/ CHARLES E. WHITTAKER
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of June, 1958.

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IN THE SUPREME COURT OF THE UNITED STATES,

No. 1083

October Term 1957.

Now No. 117

October Term 1958.

IN THE MATTER OF THE ESTATE OF DAISY WARE BEACH, OSAGE ALLOTTEE NO. 719, DECEASED. GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian, and JOHNNIE MOHON, as legal guardian of GLADYS NAOMI WARE, an incompetent person, *Petitioners*,

vs.

BERNARD E. BEACH, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

The respondent, Bernard Beach, prays that the petition of Johnnie Mohon, legal guardian of Gladys Naomi Ware, for a writ of certiorari to the Supreme Court of Oklahoma be denied.

The Opinion Below.

The opinion of the Supreme Court of Oklahoma was announced on June 25, 1957, and is reported in 322 P. 2d 635.

Petition for rehearing was denied by the Supreme Court of Oklahoma on the 18th day of February, 1958.

Jurisdiction.

The Petition for Certiorari Was Filed Too Late.

The petition for writ of certiorari was filed in this Court on June 19, 1959.

No application for enlargement of the time was made to this Court until June 9, 1958, twenty-one days after the time had expired. The order made on that application on June 10, 1958, provides for an extension of time to June 23, 1958, "providing the statutory time has not already expired."

The statutory time had expired on May 19, 1958. The petitioner seeks to add to that time the period during which she was seeking permission from the Supreme Court of Oklahoma to file a second petition for rehearing—which permission was denied March 11, 1958.

The time cannot be so extended. It was so decided by this Court in the case of *Gypsy Oil Company* v. *Escoe*, 275 U. S. 498, 72 L. ed. 393, from which the following is quoted, page 393:

> "November 21, 1927. *Per Curiam*: This petition for certiorari to the Supreme Court of the State of Oklahoma is denied.

"The application was not made in accordance with S. 8(a), Act of February 13, 1925, Chap. 229, 43 Stat. at L. 936, 940, U. S. C. Title 28, S. 230, which provides: 'No writ of error, appeal or writ of certiorari shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *.'

"The judgment of the Supreme Court was entered March 22, 1927. A timely petition for rehearing was denied June 14, 1927. On June 18, 1927, an application for leave to file a second petition for rehearing was indorsed:

'Leave granted to file — Fred C. Branson, Chief Justice.'

"On August 2, 1927, as appears from the minutes, the following proceedings were taken by the court: '*Gypsy Oil Company* v. *Escoe, et al.* Application for leave to file a second petition for rehearing denied; application for oral argument denied. Fred C. Branson, Chief Justice.'

"On September 30, 1927, more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.

"The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153, 154, 70 L. ed. 518, 519, 520, 46 Sup. Ct. Rep. 241.

"If, however, a timely motion for leave to file the second petition *is granted*, and the petition is

actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

(The three months time was changed to ninety days in 1940, Title 28, Section 2101.)

Exactly the same situation prevails here. Rule 29 of the Oklahoma Supreme Court permits the asking of leave to file application to file a second petition for rehearing but does not permit of the filing without leave of the Court.

Rule 29 says:

"29. *Application for Second Petition for Replication*: (1) Within five (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of the Court * * *."

In the reported *Gypsy Oil Company* case leave was granted to file the application for leave to file the second petition for rehearing but leave to file the second petition for rehearing was ultimately denied. That is exactly what happened here.

On March 11, 1958, this order was made (App. 36a):

"The Clerk Is Hereby Directed to Enter the Following Orders: * * * 36,581—Gladys Naomi Ware, *et al.*, v. Bernard E. Beach. Application for leave to file second petition for rehearing denied."

After the time had expired to file petition for writ of certiorari in this Court the petitioner sought to have the Oklahoma Supreme Court enlarge time by asking that

the Court clarify its judgment. Of course the judgment could not be clarified or explained. The record was already clear. The petition for rehearing had been denied on Febuary 18, 1958. The time then began to run. The petitioner sought to file a second petition but leave to file it was denied on March 11, 1958. Leave to file it was never granted and it was not "actually entertained" by the court.

The Oklahoma Supreme Court cannot extend the time for this Court or conclude for it when the time begins to run to apply to this Court for writ of certiorari.

The clarifying order says that the judgment became final when the mandate was sent to the trial court but obviously the clerical act of sending a mandate to the trial court has nothing to do with the finality of a judgment.

Nor does the stay of enforcement of the judgment to allow time to make application to this Court for writ of certiorari affect the finality of the judgment.

Nor do efforts for permission to file a second petition for rehearing affect the finality of the judgment.

Mr. Chief Justice TAFT in a similar situation, in the case of *Morse* v. *United States*, 270 U. S. 151, 70 L. ed. 581, said (from p. 154 U. S.):

> "This leave, though applied for twice, was not granted. Applications for leave did not suspend the running of the ninety days after the denial of the motion for a new trial within which the application for appeal must have been made."

Then, too, the ninety days' time actually expired again after the denial of permission to file the second petition on March 11, 1958, and before the order purporting to extend the time was made by this Court on June 10, 1958. The ninetieth day after March 11, 1958, was June 9th, and application for enlargement was filed on that day, which might be considered in time after March 11, under Rule 34, but the order made on June 10th was conditional upon the time not having already expired. As the time had actually expired there was no order extending the time.

Statement and Question Presented.

The respondent's understanding of the question presented is not as presented by petitioner. It is not believed to be a question as to the power of Congress over Indians. No one questions that power.

The Osage Act of February 27, 1925, provides in substance that heirs of Indian blood could inherit from restricted full blood Indians (App. 2a).

The respondent, Bernard Beach, and Daisy Ware, a restricted Osage Indian, were married in 1934. Daisy died May 18, 1949. Her closest blood kin was the petitioner, an incompetent sister, who has been for years confined to the Oklahoma State Hospital for the insane and whose assets equal or exceed those of her deceased sister.

Daisy's heirs at law were her husband, Bernard Beach, and this sister, Gladys Naomi Ware.

After Daisy's death and on September 1, 1950, Congress amended the 1925 Act to provide that an heir of a restricted Osage Indian in order to inherit would have to establish that he was a citizen of the United States and that he or an ancestor was on a tribal roll prepared under the direction of the Secretary of the Interior. The amendment excluded from its operation pending cases where heirs had formally alleged Indian blood (App. 2a).

The respondent claims:

1. His claim to Indian blood was actually made, sufficiently raised, and put in issue before the amendment was ever passed by Congress, and

2. That the title to the property which he had inherited passed to him some fifteen and a half months before the amendment was enacted and under the law as it existed at that time, and that Congress could not and did not intend to change the law so as to take from him property already inherited.

There Exists no Good Reason for This Court to Exercise Its Discretion in Favor of Granting Certiorari.

1. No other case has arisen calling for application of the amendment to a pending case.

The respondent knows of no other such case, and counsel for petitioner has stated that he knew of no other such case.

Therefore no precedent can be established by a decision of this case by this Court.

2. The decision of the Supreme Court of Oklahoma is important only to the litigants.

3. It does not conflict with other decisions of this Court.

4. It does not involve a Federal question of substance or one that can arise again.

5. It is is not inequitable. Bernard Beach was the husband of Daisy for sixteen years. He could not be called a "social prospector."

Bernard Beach Fully Complied With the Provision of the Amendment as to Pending Cases.

Daisy Ware Beach died May 18, 1949. The amendment was enacted into law September 1, 1950, and before the amendment became effective these things happened:

1. The guardian of petitioner Gladys Ware on April 4, 1950, filed in the County Court of Osage County, Oklahoma, her petition for appointment of the guardian as administratrix with will annexed, therein alleging that the decedent was a restricted full blood member of the Osage Tribe of Indians, and that the decedent's husband, Bernard Beach, was not of Indian blood and could not inherit and was therefore, not entitled to name the administrator (C-m. 14).

2. On April 6, 1950, Bernard Beach, the surviving husband, filed in said County Court his election to take under the law of descent of Oklahoma—as the law permitted him to do. He also filed his petition for the appointment of Paul A. Comstock as administrator. (C-m., pp. 6, 7)

3. On May 2nd, 1950, Bernard Beach testified in the County Court that he was of Indian blood (C-m. pp. 685, 686). On the same day Paul A. Comstock was appointed administrator by the County Court of Osage County, Oklahoma.

4. The petitioner, guardian of Gladys Naomi Ware, appealed from that appointment to the District Court of Osage County, Oklahoma, as to the appointment of the administrator. In the District Court the matter was tried *de novo* June 20, 1950. At that hearing these proceedings were had with Bernard Beach on the witness stand (C-m. 684):

"Bernard, are you of Indian blood?

A. Yes, I am.

Mr. Files: Just a minute, we object as incompetent, irrelevant and immaterial and not a matter before the court at this time.

The Court: Overruled, he has answered.

Mr. Files: Exception.

Mr. Gray, Did you get his answer, Mr. Harkin?.

The Court Reporter: Yes, sir.

Mr. Files: Now we move that the answer of the witness be stricken for the reason that it is incompetent, irrelevant and immaterial at this time and not within the issues before the court.

The Court: Well, I will agree this is not within the issues but it is for the record.

Mr. Files: And my motion is to strike the answer.

The Court: Yes, that motion will be sustained.

Mr. Gray: We except to the sustaining of the motion to strike the answer."

The District Court again appointed Mr. Comstock as administrator.

The guardian appealed from that judgment to the Supreme Court of Oklahoma still claiming that she was entitled to be appointed as administratrix. The trial court was affirmed. *In re Beach's Estate*, 206 Okl. 81, 241 P. 2d 390.

In the Supreme Court of Oklahoma, on the appeal in the administration matter, the petitioner in her brief contended (C-m., pp. 700-701):

"III. That Bernard Beach, the husband of the deceased, has no right or interest in the estate of the decedent unless and until he establishes that he is of Indian blood."

The respondent's answer to that contention in his brief was (C-m. 703):

"Bernard Beach the husband, has established that he is of Indian blood."

In the reply brief of the petitioner in that case she said (C-m., p. 710):

"However, the election very positively puts the question of Indian blood in issue."

Please remember that this discussion in the briefs was concerning the happenings in the trial court before the amendment in question was enacted.

The petitioner there concedes that the question of Indian blood had been put in issue in the trial court before the time of the passage of the amendment.

To further show that the question as to Indian blood had been raised in the trial court in the administration matter and before the enactment of the amendment there is quoted here a short extract from the opinion of the Supreme Court of the State of Oklahoma, in the opinion which decided the right to the appointment as administrator. *In re Beach's Estate,* 241 P. 2d 390, 393:

> "In the trial appellee testified that he was of Indian blood. On motion of appellants the answer was stricken. On this record we cannot assume that he is or is not of Indian blood. That issue is not before us."

It Was the Intention of Congress That the Heir Claim His Right to Inherit as the Oklahoma Law Provided He Should Do.

Bernard Beach filed his election to take under the law of descent and distribution at the very beginning of the proceeding and nothing more was required.

In 1912 the Osage Federal Acts made the probate law of Oklahoma, substantive and procedural, applicable to the estates of Osage Indians. Act of April 18, 1912, Sec. 3 (37 Stat. L. 86):

> "Sec. 3. That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purposes to the allottees of said tribe, *shall in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma* but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said

superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. ***"

Section 8 of the same Act reads:

"Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will *in accordance with the laws of the State of Oklahoma;* Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

The following is from the opinion of the Supreme Court of Oklahoma in the case *of Boyes' Estate* v. *Boyes*, 184 Okl. 438, 87 P. 2d 1102, p. 1105:

"The administration of an estate of a deceased is not an action at law nor in equity, but a probate proceeding. The duty devolves upon the county judge, acting within his probate power as such, to determine the heirs and their respective rights of inheritance, and to distribute the estate in accordance with the provisions of the will of the decedent or of the statutes of descent and distribution. No pleading setting forth a claim to any interest in the property is required (*Hetherington* v. *Falk*, 173 Okl. 437, 49 P. 2d 756)."

Bernard Beach had claimed the right to inherit. The guardian had denied the right, asserting that he did not have Indian blood. Bernard offered to prove and had proved he was of Indian blood in two courts. The petitioner interpreted the pleadings as definitely putting in

issue the question of Indian blood. Congress had made the Oklahoma law applicable to the Osages and under it nothing further was required to claim the right to inherit.

The Cases Cited by Petitioner Are Not in Point.

They have to do with the power of Congress to legislate concerning Indians, which power is not questioned.

The case of *Blanset v. Cardin*, 256 U. S. 319, cited by petitioner, is not in point because of the difference in the Acts of Congress.

In the *Blanset* case the Act involved was the Act of February 14, 1943 (37 Stat. at L. 678) which provides for Indians disposing of his property by will, "in accordance with regulations to be prescribed by the Secretary of the Interior."

The Osage Act authorizing the making of a will by an Osage Indian is Section 8 of the Act of April 18, 1912, already herein quoted, which provides for an Osage Indian to make a will "in accordance with the laws of the State of Oklahoma."

However it should be understood that in the present case there is not presented any conflict between Federal law and Oklahoma law. The question concerns one Federal Act and an amendment thereto. It is whether or not Congress intended to or could make the September 1, 1950, amendment applicable to the facts when Beach had already inherited under the provisions of the Act of February 27, 1925, which was in force at the time of the death of Daisy Ware Beach.

Neither is there a question as to the power of Congress to protect the Indians. It is simply a question of what Congress has done and if the change Congress has made operates in the future, or could be retroactive so as to destroy a vested right, and did Congress intend the Act to be retroactive.

The Amendment Changed the Substantive Law and Not the Procedure.

Please note that under the act before amendment any heirs of Indian blood could inherit. There are Indians in Canada and Indians in Old Mexico, a few of whom have appeared in the Osage as husbands of Osage Indians.

The amendment says that the Indian heir must be a citizen of the United States. The amendment then did not change the procedure by which the Indian heir of old Mexico or Canada was to prove his Indian blood. It completely and entirely prohibited him from inheriting, which he could have done had his intestate died before the enactment of the amendment.

Then, too, it is a well known historical fact that there were many Indians and many more mixed-blood Indians who were never enrolled on any roll compiled under the direction of the Secretary of the Interior. For instance, it is an historical fact that many Cherokee Indians and others of the Five Tribes in the early times went to Texas and to other states and never came back to the Indian Territory to be enrolled. Then, too, there were always some Indians who remained where they were when the Tribe was moved and such Indians were doubtless never en-

rolled. Those are all historical facts which are well known to all historical writers about Indians and appear in their writings.

There were perhaps more of such Indians and their descendants than there were enrolled Indians.

It should also be remembered that there were many Indian Bands and Tribes along the Atlantic Coast and in the northern and eastern part of the United States and that for many years the government was not interested in making rolls of the Indians and without doubt there were many individual members and even whole bands or tribes, which were never enrolled on any roll prepared under the direction of the Secretary of the Interior. In fact this country did not even have a Secretary of the Interior for nearly 300 years after Columbus discovered it and so it would have to be acknowledged that there are very many persons of Indian descent whose ancestors were not enrolled.

Now under the 1925 Act any of those persons of Indian blood, no matter of what *quantum*, could inherit from a restricted Osage Indian. See *In re Hamm's Estate*, 186 Okl. 610, 99 P. 2d 895. While under the amendment only those Indians who were on a roll of the Secretary of the Interior or who had a lineal ancestor on that roll can inherit. All such unenrolled Indians are excluded from inheritance and before the amendment they could inherit.

It is, therefore, no longer a question of evidence at all. The amendment simply divided the Indians into two classes:

1. Those who are enrolled;

2. Those who are not enrolled.

It denies those who are not enrolled the right to inherit. Theretofore such unenrolled Indian could inherit. If the unenrolled Indian had acquired the right to inherit, before the amendment was adopted, he could not be deprived of it by the amendment.

The amendment does not attempt to make a rule of evidence. It simply says that the enrolled Indians may inherit and the unenrolled Indians may not.

From 11 Am. Jur. 1198:

> "Irrespective of any express prohibition as to the enactment of retrospective laws, and, in consequence, laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy *vested* property rights, and that *even if a law is intended simply to change the remedy or procedure, it is void if in fact it impairs vested rights.*"

Also 11 Am. Jur. 1204:

> "Hence a statute is unconstitutional which in effect, either by legislative fiat or by *direct or indirect operation, takes the property of one man and gives it to another.*"

The Supreme Court of the United States has since almost the time of its creation followed the same rule. See from the opinion by Chief Justice MARSHALL, in the case of *Fletcher* v. *Peck*, 6 Cranch. 87, 3 L. ed. 162, opinion page 177:

> "Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the power of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be contoverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact."

In the opinion in the case of *Downs* v. *Blount*, 95 C. C. A. 289, 170 Fed. 15, 31 L. R. A. (NS) 1076, this was said:

> *"And it is true that, under pretense of making or changing a rule of evidence, the legislature cannot deprive a party of a vested right in property."*

Bernard Beach was not without competent evidence to establish his Indian blood. He did establish it by competent evidence. Under the 1925 Act he can inherit, but under the amendment he could not inherit, not because he is not of Indian blood and not because he has failed to prove that he is of Indian blood by competent evidence, but because he is not, and his lineal ancestors were not, on a roll of the Secretary of the Interior.

It is not under the amendment, any more, even a question of Indian blood but has become a questior of who is on a roll of the Secretary of the Interior.

From 12 C. J. 956, 957 and 959:

"Sec. 487, 2. *Power of United States.* The Fifth Amendment to the Constitution of the United States which provides that no person shall be 'deprived of life, liberty or property without due process of law, secures the individual against any action of the federal government divesting vested rights.

"Sec. 507 d. *Rights of Heirs and Legatees*—(1) *In General.* During a person's lifetime his heirs, devisees, or legatees have no vested interest in his property which may not be destroyed by a statute or constitutional provision regulating the succession of property. Expectant heirs must look for their vested rights to the law in force at the time of the ancestors' death. Thus it has been held with the power of the legislature to provide that advancements previously made shall be considered a part of an intestate's estate for the purposes of distribution. Where, however, on a person's death, the rights of his heirs, devisees or legatees have thereby become vested, these rights may not be impaired by subsequent legislation."

It is apparent that Congress did not intend to pass an unconstitutional act by destroying rights which had already vested by the taking of property from one who had already acquired the title thereto.

The language of the amendment shows that there was no intention to destroy rights which had already been acquired. In fact Congress attempts to preserve those rights by providing for their preservation and Congress, perhaps unfamiliar with the Oklahoma probate procedure, had no intention of changing the Oklahoma law of procedure but did intend to say and did in effect say that in those cases where the issues were made the new amendment should not apply.

See 11 Am. Jur., p. 733:

"Sec. 100. *Restrictive Interpretation.* One important corollary of the general doctrine that it is the duty of the courts, if possible, to construe a statute so as to permit its provisions being upheld as constitutional is recognized in interpreting statutes which in their terms are broad enough to cover matters without as well as within the jurisdiction of the legislative body. • • •

"Another important corollary of the general principle is the rule that a statute need not be treated as unconstitutional or void for not containing an exception or qualification which the law will imply. The operation of a law in such cases may be restrained within constitutional limit without necessitating a decree that the act itself is void."

From the foregoing authorities it is very apparent from the language of the amendment that Congress intended to exclude from the operation of the amendment at least all of those cases in which the issues had been made prior to the enactment of the amendment, and from the foregoing authorities it is apparent that the act must be given a construction, which would not cause it to destroy rights which had already vested prior to the enactment. Actually the amendment expresses the intention not to destroy them.

Conclusion.

The writ should be denied.

Respectfully submitted,

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